

we note that all of the commenters who addressed the question supported a bidding credit or other special measure for applicants with no or few other media interests.²²⁶ We conclude that, based on the record to date, adopting such a "new entrant" bidding credit would be the most appropriate way to implement the statutory provisions regarding opportunities for small, minority- and women-owned businesses before the completion of the studies mentioned above and related public comment.²²⁷ Providing bidding credits to entities holding no or few mass media licenses will promote opportunities by minorities and women consistent with congressional intent without implicating prematurely the constitutional issues raised in ¶ 188.²²⁸ While such an approach may not be as direct and fine-tuned as measures we may ultimately adopt after further development of the record, we believe a bidding credit for entities who have no or few other media interests will work to give these groups the additional opportunities intended by Congress, in furtherance of the statutory objectives. Because the record regarding small businesses is not well developed and existing size standards seem ill-suited to the broadcast auction context, we do not believe it is appropriate, as we did for certain other auctions, merely to adopt bidding credits for small businesses. In these circumstances, we conclude that the best approach is to commence the auction process utilizing this "new entrant" bidding credit.²²⁹ We hereby instruct the staff to complete expeditiously all necessary *Adarand* studies, and we anticipate the release of a further notice considering designated entity issues in the broadcast context following completion of these studies. If additional or alternative designated entity measures are ultimately adopted in a further report and order released following completion of our evidentiary studies, then any such measures will be applicable to the auction of any broadcast and ITFS applications then on file with the Commission.

190. With respect to the details of our new entrant bidding credit, we believe an appropriate model that has worked well exists in our lottery rules for mass media services. Those rules have been used for several years for LPTV, television translator and Multipoint Distribution Service licenses. The rules take a two-tiered approach. Specifically, applicants whose owners in the aggregate hold more than 50% of the ownership interests in no other media of mass communications receive a two-to-one lottery preference, and applicants whose owners in the aggregate hold more than 50% of the ownership interests in one, two or three other media of mass communications receive a one and a half to one lottery

²²⁶ See, e.g., Comments of Grace Communications L.C. at 9; Kidd Communications at 9; JTL Communications Corp. at 14-15; Danbeth Communications, Inc. at 4-5; James G. Cavallo at 9-11; Thomas Desmond at 5-6; Kyle Magrill at 3; Throckmorton Broadcasting, Inc. at 12; Reply Comments of United Church of Christ, Office of Communications, *et al.* at 15-16.

²²⁷ Rural telephone companies appear less relevant in the context of these pending comparative broadcast cases. See *infra* ¶ 191.

²²⁸ See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (Sixth Report and Order)*, 11 FCC Rcd 136 (1995), *aff'd sub nom. Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (Commission complied with statutory mandate to create opportunities for small, women- and minority-owned businesses, yet avoided the *Adarand* constitutional issue, because expanding the special measures available for small businesses would incidentally benefit businesses owned by minorities and women, many of which also qualified as small businesses).

²²⁹ At this time, we are not utilizing an asset or gross revenue standard in conjunction with the new entrant bidding credit. If it appears, however, after some experience with implementing the new entrant credit in broadcast auctions that such a standard is necessary and appropriate to effectuate congressional intent with regard to designated entities, then we may revisit this question.

preference. See 47 C.F.R. § 1.1622(b).²³⁰ These preferences are not available to entities holding more than 50% of the ownership interests in certain local media services.²³¹ We will use these rules with two adjustments: (1) we will add an explicit requirement that the rules cover *de facto* controlling interests, as well as interests of more than 50% of the ownership interests; and (2) to conform the approach to the existing tiered approach taken with auction bidding credits, see 47 C.F.R. § 1.2110(e)(2), we will adopt bidding credits of 35% and 25%, respectively.²³²

191. **Other Designated Entity Issues.** Although we are deferring a final decision regarding any additional or alternative special measures for small, minority- and women-owned businesses until the completion of the various pending studies relating to these entities, we determine here certain other designated entity issues. We conclude that the provision of additional measures for rural telephone companies is unnecessary in broadcast auctions. The record does not indicate that rural telephone companies have any particular interest in providing broadcast services.²³³ Indeed, no commenter supports providing bidding credits or other incentives to rural telephone companies. As we have previously noted, Congress included rural telephone companies among the categories of designated entities because it was "concerned with assuring rural consumers the benefits of new technologies and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities." *Second Report and Order*, 9 FCC Rcd at 2391-92. We do not believe that bidding credits or other special measures for rural telephone companies are needed to assure that rural consumers receive new broadcast service or that rural telephone companies have the opportunity to participate in broadcast service auctions. We accordingly decline to adopt special measures for rural telephone companies in particular, although those companies will be eligible for bidding credits if they qualify as new entrants or, if such bidding credits are ultimately adopted in our further report and order, as small, minority- or women-owned businesses.

192. We also decline to adopt bidding credits, as urged by a small number of commenters, for various other entities, including: (1) applicants who would have qualified for an AM daytime-only preference in an FM comparative hearing;²³⁴ and (2) a "pioneer's" or "finder's" preference for the applicant

²³⁰ In accordance with the definition previously employed in lotteries, a "medium of mass communications" for purposes of the new entrant credit means a daily newspaper; a cable television system; or a license or construction permit for a television station, a low power television or television translator station, an AM, FM or FM translator station, a direct broadcast satellite transponder, or a Multipoint Distribution Service station. See 47 C.F.R. § 73.5008(b) of our amended rules, attached as Exhibit C.

²³¹ See 47 C.F.R. § 73.5007(a)(1) of our amended rules.

²³² See 47 C.F.R. § 73.5007(a) of our amended rules.

²³³ See Comments of De La Hunt Broadcasting Corporation at 3; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc., at 22-23; James G. Cavallo at 8.

²³⁴ See Comments of JEM Broadcasting Co., Inc. at 3-4; Pacific Radio Engineering at 1; KERM, Inc. at 7-8. In the past, the Commission gave special consideration to daytime-only AM licensees in comparative hearings for FM allotments in their community of license.

who successfully petitioned for the allotment when a newly-allotted FM channel is auctioned.²³⁵ We decline to adopt bidding credits or other special measures for these categories of entities, which, unlike the case with the likely recipients of the "new entrant" credit, are not among the entities specifically designated by Congress in our competitive bidding authority. We are also reluctant to replicate, in the guise of bidding credits, specific comparative criteria (such as the AM daytime-only preference), given our past difficulties with the criteria employed in comparative hearings.²³⁶ We note, moreover, that the grant of a bidding credit to an FM applicant who petitioned for the allotment of a channel being auctioned is analogous to the pioneer preferences that Congress has specifically eliminated.²³⁷

193. **Unjust Enrichment.** In designing competitive bidding systems, the Commission has a statutory obligation to require "antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment." 47 U.S.C. § 309(j)(4)(E). Accordingly, the *Notice* sought comment regarding the appropriate approach to prevent unjust enrichment by designated entities that acquire broadcast licenses through the use of bidding credits or other special measures. To fulfill our statutory obligations and ensure that the new entrant bidding credit measure we adopt herein has the intended effect of aiding eligible entities to participate in broadcast auctions, we adopt the unjust enrichment provisions described below. Provisions to prevent unjust enrichment in the context of any additional or alternative designated entity measures will be considered if any such measures are adopted in our further order specifically addressing such issues.

194. Specifically, we will follow the general Part 1 auction rules in requiring, under certain circumstances, reimbursement of bidding credits utilized to obtain broadcast licenses. A broadcast licensee, or the holder of a construction permit, who utilized a new entrant bidding credit will be required to reimburse the government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was granted, as a condition of Commission approval of the assignment or transfer of that license or construction permit, if the licensee or permittee seeks to assign or transfer control of the license or construction permit to an entity that does not meet the eligibility criteria for the bidding credit. See 47 C.F.R. § 1.2111(d)(1).²³⁸ The amount of this repayment will be reduced over a five-year period, as set forth in 47 C.F.R. § 1.2111(d)(2).²³⁹ This

²³⁵ See Comments of JEM Broadcasting Co., Inc. at 4; Sound Broadcasting, Inc. and Regency Broadcasting, Inc. at 3-4; Reynolds Technical Associates at 4; Kidd Communications at 10-11.

²³⁶ See Comments of James G. Cavallo at 11-12 (opposes awarding bidding credits for factors that were previously credited under Commission's comparative hearing criteria, as that risks "turning the auction into a mini-comparative hearing").

²³⁷ See 47 U.S.C. § 309(j)(13)(F) (eliminating pioneer preferences for persons who make significant contributions to development of new service or new technologies, as of August 5, 1997).

²³⁸ If the construction permit or license is transferred to an entity that is eligible for a lower bidding credit than the permittee or licensee, then the reimbursement is the difference between the amount of the bidding credit originally utilized and the amount of the bidding credit for which the transferee/assignee would qualify.

²³⁹ A transfer within the first two years after grant of the construction permit will result in a forfeiture of 100% of the value of the bidding credit; during year three, of 75% of the bidding credit; in year four, of 50%; in year five, of 25%; and thereafter, no forfeiture. We will follow the Part 1 auction rules in establishing this five-year

unjust enrichment provision also responds to the concerns expressed by the court in *Bechtel II* regarding the ephemeral nature of comparative preferences and the need for post-grant enforcement. See 10 F.3d at 879-880.

195. However, if a permittee or licensee who utilized a new entrant bidding credit to obtain a broadcast license simply acquires within the five-year reimbursement period an additional broadcast facility or facilities, such that the licensee would not have been eligible for the new entrant credit, the licensee will not be required to reimburse the government for the amount of the bidding credit. To require reimbursement in such a situation would discourage new entrants from attempting to obtain another broadcast facility and would, in effect, punish the most successful new entrants into the broadcast industry. We believe such a result would be contrary to the basic purpose of the new entrant bidding credit, which is to encourage new entities to not only enter, but to remain and succeed, in the broadcast industry. We note this approach is in accord with existing Commission rules as to certain small business special measures.²⁴⁰ Accordingly, we will not, as proposed for designated entities generally in the *Notice*, require broadcast permittees and licensees granted a license through a new entrant credit to certify annually their continuing eligibility for the credit under the new entrant rule in effect when the permit or license was awarded.²⁴¹

196. Based on our experience conducting numerous auctions, we believe that these reimbursement requirements are sufficient to preserve the integrity of the designated entity measures adopted herein, and we note that the few commenters who addressed unjust enrichment issues generally agree.²⁴² To improve our ability to enforce these reimbursement requirements, we also intend to amend our broadcast transfer and assignment applications to include questions as to whether the construction permit or license at issue was obtained via competitive bidding and whether the licensee used a new entrant bidding credit.

D. Auction Authority for Instructional Television Fixed Service

reimbursement period, rather than the shorter two- or three-year period supported by one commenter. See Comments of KM Communications, Inc. at 10.

²⁴⁰ See, e.g., 47 C.F.R. § 1.2111(c)(2) (a licensee, such as a small business, paying for licenses obtained by auction through installment financing does not lose its small business status and its eligibility for such financing due to an increase in annual gross revenues resulting from operations, business development or expanded service.)

²⁴¹ We will consider the appropriateness of such a five-year certification requirement in the context of other designated entity measures, such as bidding credits for minority- or female-owned businesses, if such measures are adopted in our further report and order on designated entities.

²⁴² See Comments of Tri-County Broadcasting, Inc. at 7-8; KERM, Inc. at 8-9; Thomas Desmond at 7. Only one commenter called for additional enforcement actions, including short-term renewals, forfeiture and revocation proceedings, in addition to the monetary reimbursement of the bidding credit, but offered no explanation as to why such additional measures were needed to preserve the integrity of our designated entity policies. See Comments of Kidd Communications at 11. We similarly believe that imposing a holding period on broadcast permittees and licensees who obtain their permits through the use of a new entrant bidding credit would be inappropriate, as prohibitions on permit transfers are "likely" to delay service to the public, contrary to the purpose of Section 309(j). *Second Report and Order*, 9 FCC Rcd at 2385.

197. *Statutory Authority.* The Instructional Television Fixed Service (ITFS) is a point-to-point or point-to-multipoint microwave service whose channels are allocated to educational organizations and are used primarily for the transmission of instructional, cultural and other types of educational material.²⁴³ As described above, Section 309(j) of the Communications Act, as amended by the Budget Act, mandates the utilization of competitive bidding to resolve mutually exclusive applications, with certain specified exemptions. See 47 U.S.C. § 309(j)(1) & (2). Although the spectrum reserved for ITFS, an instructional microwave service, is not specifically exempted from the Commission's expanded general auction authority, the channels reserved for noncommercial educational and public broadcasters, as discussed above, are so exempt under Section 309(j)(2)(C). See *supra* ¶ 24. Given this apparent disparity between the treatment of spectrum similarly reserved for educational purposes, we sought comment on whether, under the terms of the amended Section 309(j), we must, and if not, whether we should, apply competitive bidding to mutually exclusive ITFS applicants. See Notice, 12 FCC Rcd at 22404-22405 (¶¶ 98-100). Based on our further review of the express terms of the amended Section 309(j), we conclude that channels reserved for ITFS are not exempt from competitive bidding under Section 309(j)(2)(C).

198. As originally provided in 1993, the Commission's initial auction authority was limited to services where licensees received compensation in exchange for providing transmission or reception capabilities to subscribers. Thus, the Commission at that time lacked the authority to auction the broadcast services as well as ITFS, and Congress specifically indicated that the Commission was not to construe payments received by ITFS licensees for leasing excess capacity to MDS operators as constituting compensation from "subscribers," as that term was used in the initial auction statute.²⁴⁴ The Budget Act, however, amended Section 309(j) so as to eliminate the subscriber limitation from the Commission's auction authority and to *mandate* the use of competitive bidding to resolve mutually exclusive applications, with certain specific exceptions.²⁴⁵ The exceptions to this general auction mandate are set forth in Section 309(j)(2), which provides that the Commission's competitive bidding authority "shall not apply to licenses or construction permits issued" in three specific services, of which ITFS is not one. 47 U.S.C. § 309(j)(2).²⁴⁶

²⁴³ Authorized ITFS "channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools," with certain exceptions. 47 C.F.R. § 74.931(a)(1). Specifically, ITFS licensees may lease excess capacity on their channels to Multipoint Distribution Service (MDS) operators, which have generally used such excess capacity to transmit multichannel video programming to subscribers. An ITFS licensee who leases excess channel capacity to an MDS operator must still provide a total average of at least 20 hours per channel per week of ITFS programming on its authorized channels, and must also retain the right to recapture an additional 20 hours per channel per week for its ITFS programming. *Id.*

²⁴⁴ See H.R. Rep. No. 213, 103d Cong., 1st Sess. 481-482 (1993).

²⁴⁵ See 47 U.S.C. § 309(j)(1) (if "mutually exclusive applications are accepted for *any* initial license or construction permit, then, *except as provided in paragraph (2)*, the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive bidding") (emphasis added).

²⁴⁶ Section 309(j)(2) states that the Commission shall not apply competitive bidding to the public safety radio services; to the initial digital television licenses given to existing broadcast licensees to replace their analog television licenses; and to stations described in Section 397(6), which defines "noncommercial educational broadcast" and "public broadcast" stations. 47 U.S.C. § 309(j)(2)(A)-(C).

199. Because Section 309(j) generally requires the use of competitive bidding to resolve mutually exclusive applications with only certain specified exemptions, the Commission does not have the discretion to create another exemption for ITFS. When Congress explicitly enumerates certain exceptions to a general requirement, additional exceptions should not be implied.²⁴⁷ The list of exemptions from our general auction authority set forth in Section 309(j)(2) is clearly exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding. By its express terms, Section 309(j)(1) requiring the use of auctions to award licenses or permits applies to all situations in which mutually exclusive applications are filed *except as provided in paragraph (2)*. Nothing in the language of Section 309(j)(2) enumerating three types of licenses or permits not included in our general auction authority, nor in the accompanying legislative history, suggests that Congress intended to authorize the creation of additional categories of licenses that would not be awarded by a system of competitive bidding.

200. We also decline to interpret the noncommercial educational *broadcast* exemption from competitive bidding contained in Section 309(j)(2)(C) to include ITFS, as urged by many commenters.²⁴⁸ As the Commission has stated and the courts have recognized, ITFS is not a broadcast service. The primary use of ITFS, delivery of educational materials to a limited audience (students pursuing academic credit), does not constitute a broadcast use because the communications are not intended to be received by the general public.²⁴⁹ Moreover, excess capacity use of ITFS channels (such as by MDS operators)

²⁴⁷ See *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). See also 2A N. Singer, *Sutherland Statutory Construction* §§ 47.11, 47.23 (5th ed. 1992).

²⁴⁸ The following commenters and reply commenters all oppose subjecting ITFS to competitive bidding under Section 309(j), generally arguing that ITFS falls within the noncommercial educational exemption from auctions set forth in Section 309(j)(2)(C): ITFS Parties; BellSouth Corporation and BellSouth Wireless Cable, Inc.; Indiana Higher Education Telecommunications System; School District of Palm Beach County, Florida; Wireless Cable Association International, Inc.; National ITFS Association; *College of the Albermarle, et al.*; *Corporation for Public Broadcasting*; Board of Trustees of Community-Technical Colleges (Connecticut), *et al.*; Rocky Mountain Corporation for Public Broadcasting; Edward Czelada; University of North Carolina, *et al.*; Community Telecommunications Network; Ball State University, *et al.*; ITFS Coalition; Throckmorton Broadcasting, Inc.; Board of Education of the City of Atlanta, *et al.*; Mitchell Community College; Rowan-Cabarrus Community College; and Association of America's Public Television Stations. One commenter supports competitive bidding for ITFS, stating that, because ITFS is not specifically exempted from Section 309(j)'s broad general auction authority, the Commission must auction mutually exclusive ITFS applications. See Comments and Reply Comments of Hispanic Information and Telecommunications Network.

²⁴⁹ Section 3(6) of the Communications Act defines broadcasting as the "dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(6). See also *Memorandum Opinion and Order* in MM Docket No. 83-523, 59 RR 2d 1355, 1376 (1986) (classifying ITFS as nonbroadcast); *Telecommunications Research and Action Center*, 836 F.2d 1349, 1354 (D.C. Cir. 1988) (ITFS used for the precise purpose of providing educational programming to a narrow group of students is clearly not broadcasting, as defined by Communications Act).

is typically provided on a subscription basis, and the Commission has clearly determined that subscription video services are not broadcast.²⁵⁰

201. Because the exemption from competitive bidding set forth in Section 309(j)(2)(C) specifies only Section 397(6) of the Communications Act, which refers to only noncommercial educational and public broadcast stations, we have no authority to exempt a nonbroadcast service such as ITFS. As the Supreme Court has repeatedly emphasized, there is one "cardinal canon" in interpreting a statute -- a presumption "that a legislature says in a statute what it means and means in a statute what it says there."²⁵¹ Moreover, Congress could have simply and clearly made that exemption include ITFS by referencing Section 397(7) of the Communications Act, as well as Section 397(6). Section 397(7) defines the term "noncommercial telecommunications entity," which would include ITFS licensees.²⁵² The fact that Congress chose not to reference Section 397(7), in addition to Section 397(6), in the Section 309(j)(2)(C) exemption from competitive bidding further supports the conclusion that Congress did not intend to exempt ITFS from competitive bidding.

202. Given the explicitness of the statutory mandate to utilize competitive bidding and the limited nature of the statutory exemptions from competitive bidding set forth in Section 309(j)(2), examining the legislative history of the Budget Act as a guide to interpretation of the amended Section 309(j) appears unnecessary.²⁵³ In any event, in this case recourse to the legislative history of the Budget Act is not particularly enlightening, as it contains no discussion whatsoever concerning ITFS. Furthermore, the policy arguments set forth by various commenters against auctioning ITFS cannot override Section 309(j)'s statutory mandate to utilize competitive bidding for competing applications in all services, except those specifically exempted.²⁵⁴

²⁵⁰ In *Subscription Video Services*, 2 FCC Rcd 1001 (1987), the Commission held that subscription video services are not broadcasting services, and this determination was subsequently affirmed on appeal. See *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). We have also recently reaffirmed the classification of subscription MDS as a non-broadcast service. See *Second Report and Order* in CC Docket No. 86-179, FCC 98-70 (rel. May 4, 1998).

²⁵¹ *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

²⁵² Under Section 397(7), a "noncommercial telecommunications entity" means any enterprise that (i) is owned and operated by a state or a subdivision thereof, a public agency, or a nonprofit private foundation, corporation or association; and (ii) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including microwave. 47 U.S.C. § 397(7).

²⁵³ See *Darby v. Cisneros*, 509 U.S. 137, 147 (1993) (recourse to legislative history found unnecessary in light of plain meaning of statutory text); *Connecticut National Bank*, 503 U.S. at 254 (when words of a statute are unambiguous, then inquiry into the meaning of a statute is complete).

²⁵⁴ These commenters contend that subjecting ITFS to competitive bidding would, *inter alia*, divert the limited funds of educators away from educational purposes to purchasing licenses, favor ITFS applicants most closely tied to commercial excess capacity users and disfavor those applicants most focused on providing educational services to the community, and perhaps even discourage educators from applying for licenses. See *Comments of Corporation for Public Broadcasting* at 4-7; *ITFS Parties* at 5-6; *BellSouth Corporation and BellSouth Wireless Cable, Inc.* at 7-8; *Indiana Higher Education Telecommunications System* at 3; *School District of Palm Beach County, Florida* at 3.

203. **Congressional Clarification of Section 309(j).** Several commenters argue that, despite the absence of an express exemption for ITFS from competitive bidding in Section 309(j), Congress would not have made such a fundamental shift in its treatment of ITFS without some explicit discussion of the service in the text or the legislative history of the Budget Act.²⁵⁵ These commenters contend that the Commission should not infer from the omission of a specific statutory exemption for ITFS an intent by Congress to ignore the long-standing reservation of ITFS spectrum for noncommercial educational purposes, and urge the Commission to seek a clarifying amendment of Section 309(j) from Congress.²⁵⁶

204. Although we understand and sympathize with commenters' concerns about subjecting ITFS to competitive bidding, we, as discussed in detail above, feel compelled to conclude, based on the express terms of Section 309(j), that competing ITFS applications are subject to auction. We are concerned, nonetheless, that Section 309(j), as adopted, may not reflect Congress' intent with regard to the treatment of competing ITFS applications. Given the instructional nature of the service and the long-standing reservation of ITFS spectrum for noncommercial educational use, it is possible, as commenters argue, that Congress did not intend its expansion of our auction authority in the Budget Act to include ITFS. Accordingly, we will request that Congress amend Section 309(j) so that the statute clearly reflects its intent with regard to ITFS. Absent a clear statement from Congress that it means to exempt ITFS from competitive bidding, then the Commission will proceed with the auction of mutually exclusive ITFS applications, as described below. We will not commence ITFS auctions immediately, however, in order to allow sufficient time for us to obtain Congressional guidance.

205. **Pending Mutually Exclusive ITFS Applications.** Pending ITFS applications are outside the scope of new Section 309(l) of the Communications Act, which provides that the Commission has discretion regarding the resolution of pending comparative licensing proceedings involving pre-July 1, 1997 applications for commercial radio and television stations. Accordingly, pending mutually exclusive ITFS applications, although pending since at least the last ITFS filing window in October 1995, must be resolved by competitive bidding pursuant to Section 309(j)(1).²⁵⁷ As we concluded, however, with respect to pending broadcast applications that are outside the scope of Section 309(l) (*see supra* ¶¶ 105-109), we believe it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1), and we will therefore limit the eligible bidders in any auction of the pending ITFS applications to those with applications already on file.

²⁵⁵ See, e.g., Comments of Wireless Cable Association International, Inc. at 5; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 9.

²⁵⁶ See, e.g., Comments of Indiana Higher Education Telecommunications System at 7; ITFS Parties at 8; School District of Palm Beach County, Florida at 7.

²⁵⁷ Thus, we cannot agree with the commenters, who generally oppose auctioning pending ITFS applications. See, e.g., Comments of College of the Albermarle, *et al.* at 2-3; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 10; Wireless Cable Association International, Inc. at 14-18; National ITFS Association at 6-7. One commenter supports auctioning pending ITFS applications. See Comments of Hispanic Information and Telecommunications Network at 10.

206. We realize that the pending ITFS applicants filed their applications under our current rules, with the expectation that any mutually exclusive applications would be resolved pursuant to the Commission's established point system. These applications have, moreover, been pending since at least October 1995, and some for an even longer period of time. For these reasons, we believe that the pending competing ITFS applicants should be given an opportunity to settle, without any limitations on payments to withdrawing applicants. For a 120-day period following the publication of this *First Report and Order* in the Federal Register, the Commission will accordingly waive any of its rules (such as 47 C.F.R. § 73.3525(a)(3)) that precludes the receipt of any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal of an application, and will also waive our policy against "white knight" settlements involving the award of a license to a non-applicant third party. Given the congressional directive in Section 309(1)(3) to waive such limitations on settlement prior to any auction of the pending pre-July 1, 1997 broadcast applications, we believe it appropriate to provide a similar period for pending competing ITFS applicants to settle prior to the scheduling of any auction.

207. ***Competitive Bidding Procedures Applicable to ITFS.*** As we proposed in the *Notice*, the same application and competitive bidding procedures that we are adopting herein for the broadcast services will also apply to ITFS. Applications for new ITFS facilities or for major changes to existing facilities may only be submitted during an announced auction window; ITFS minor modification applications may continue to be filed at any time and will not be subject to competitive bidding. To apply during an announced auction window, ITFS applicants should submit an FCC Form 175 and the engineering data contained in the FCC Form 330. Applicants who submit mutually exclusive short-form applications for ITFS licenses will be subject to auction, and will be required to make all upfront, down and full payments, as set forth in our general auction rules. Only winning bidders or non-mutually exclusive applicants will be required to file complete long-form applications, and petitions to deny against ITFS long-form applications must be filed within the same ten-day period as adopted herein for broadcast long-form applications. As with the broadcast long-form applications, we are deleting the financial certification requirement from the FCC Form 330.²⁵⁸

208. We emphasize that the adoption of competitive bidding procedures for ITFS will not alter the current technical requirements, interference protection rules, or eligibility criteria for the service. Thus, to apply to participate in any future ITFS auction, the applicant must be eligible under our existing rules to hold an ITFS license.²⁵⁹ Similarly, ITFS licensees who obtain their licenses via competitive bidding will be subject to our existing rules regarding use of ITFS channels. *See supra* ¶ 197.²⁶⁰ Thus, we are

²⁵⁸ The FCC Form 330 does not contain a reasonable assurance of site certification requirement.

²⁵⁹ ITFS station licenses are "issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations." 47 C.F.R. § 74.932(a).

²⁶⁰ Under the Commission's rules, wireless cable operators are permitted to apply for ITFS channels under certain conditions. *See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 FCC Rcd 6792, 6801-06 (1991). In allowing the utilization of available ITFS frequencies by wireless cable ventures, the Commission emphasized that it would adopt procedural rules which "provide for the absolute primacy of ITFS applications vis-a-vis wireless cable applications where the two may be mutually-exclusive." *Id.* at 6805. Accordingly, Section 74.990(e) provides that "[i]f an [ITFS]

not altering in any way the basic requirements and characteristics of ITFS, but are merely altering the method through which we resolve competing applications in that service.

E. Resolution of Pending Comparative Renewal Proceedings

209. In the *Notice*, 12 FCC Rcd at 22406 (¶ 102), we proposed that, if the Commission did not adopt a revised comparative hearing system for pending comparative cases for new stations, and if comparative renewal cases where the comparative issue was decisionally significant did not settle,²⁶¹ we would instead use a two-step procedure. Under this approach, a renewal application would be granted if we determined, after a threshold hearing, that the renewal applicant deserved a renewal expectancy for "substantial performance."²⁶² As part of the two-step procedure (*i.e.*, in connection with those cases where the renewal applicant did not receive a renewal expectancy) or as an alternative, we asked for comment on whether we should consider any comparative factors raised by the applicants on a case-by-case basis. See *Notice*, 12 FCC Rcd at 22406-07 (¶ 103). We recognized that the two-step process had been determined to be unlawful by the United States Court of Appeals for the District of Columbia Circuit,²⁶³ but indicated that we believed the court could be persuaded to change its mind in light of subsequent case law.

210. We continue to believe that a two-step renewal procedure is consistent with the Communications Act and that we could convince the court to overrule its decision to the contrary.²⁶⁴ We also believe that the two-step procedure would be a quicker system for resolving these cases, at least for those cases where a renewal expectancy is granted and the hearing concludes after the first step. (We would anticipate, based on past experience, that this would be the outcome in most cases.) Indeed, we think this approach would be faster (at least for the one-step hearings) even if we stayed our decision to adopt the two-step approach pending the outcome of judicial review. Nevertheless, we have decided not to adopt the two-step procedure. We do not believe it would best serve the public interest to expend the resources of the Commission, private parties and the courts to litigate (at what would presumably have to be the *en banc* level) the lawfulness of a procedure previously found to be unlawful when the new

application and a wireless cable application for available [ITFS] facilities are mutually-exclusive . . . the [ITFS] application will be granted if the applicant is qualified." 47 C.F.R. § 74.990. Thus, consistent with our commercial ITFS processing rules, a qualified ITFS application which is mutually exclusive with an application filed by a qualified wireless cable operator, will not be subject to competitive bidding, but will be granted as required by Section 74.990(e). In the event that more than one ITFS application is mutually exclusive with a commercial ITFS application, the ITFS applications will be resolved by competitive bidding only to the extent that they are directly mutually exclusive.

²⁶¹ In this regard, we note that the Commission has waived the monetary limits on settlements in the comparative renewal context to facilitate settlements. See, e.g., *EZ Communications, Inc.*, 12 FCC Rcd 3307 (1997).

²⁶² See *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 509 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

²⁶³ *Citizens Communications v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).

²⁶⁴ See *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, 8 FCC Rcd 2834 (1993), *recon. denied*, 8 FCC Rcd 6288 (1993).

procedure would apply to only a handful of cases (roughly eight) and would have no future applicability. In addition, we note that even under the two-step procedure, we could not avoid full comparative hearings for those cases that reach the second stage because the renewal applicant does not qualify for a renewal expectancy. And, for those cases, the two-step approach would be slower since, assuming we stayed this part of our order pending judicial review, the process could not get underway until after a decision by the court.

211. As we discussed at length above, having comparative hearings for pending cases is far from the most desirable result. Indeed, our experience with the comparative hearing process has been that it tends to produce protracted litigation over minutiae of questionable public interest significance. Nevertheless, having rejected the two-step approach, we have no choice here other than to use comparative hearings. The Commission has traditionally used for comparative renewals the same standard comparative issue used in connection with mutually exclusive applications for new commercial broadcast stations.²⁶⁵ In addition, as part of the standard comparative issue in renewal proceedings, the Commission awards a renewal expectancy to renewal applicants whose performance has been "substantial."²⁶⁶ The renewal expectancy has been the most important comparative factor in a comparative renewal proceeding; integration (and diversification) have been factors of lesser weight.²⁶⁷ Although integration was less important in comparative renewal proceedings than comparative proceedings involving new applications (in those instances where the renewal applicant received a renewal expectancy), it nevertheless was one of the relevant factors. Indeed, if no renewal expectancy were awarded, it would have become a key factor. Because the court found integration to be unlawful in *Bechtel II* and prohibited its further use, any system of comparative renewal hearings we adopt here must, by definition, be different than the system we have used in the past.

212. As noted above, it is a difficult task, open to significant potential legal challenge, to attempt to craft a revised set of comparative criteria or even to establish a revised weighting system using the existing criteria other than integration and the integration enhancements as stand-alone factors. While we do not have the option of auctions in this context, we continue to believe that it does not serve the public interest to develop such a revised or newly weighted system that would apply only to a small number of cases. Developing legally sustainable criteria that would reliably predict future performance is particularly problematic when the universe to which it applies will be so small and where there will be no future applicability.

²⁶⁵ See, e.g., *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

²⁶⁶ See, e.g., *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1006-1008 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). See also *United Broadcasting Co., Inc.*, 100 FCC 2d 1574, 1576-81 (1985); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 836-43 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983). A licensee that has provided "meritorious service" has a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and that "should not be destroyed absent good cause." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805 (1978) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). *Accord Central Florida Enterprises*, 683 F.2d at 506.

²⁶⁷ See, e.g., *National Citizens Committee for Broadcasting*, 436 U.S. at 806; *Victor Broadcasting*, 722 F.2d at 765; *Central Florida Enterprises*, 683 F.2d at 509.

213. We think the most equitable and expeditious approach here would be simply to permit the renewal applicants and their challengers, within the confines of the generally phrased standard comparative issue, to present the factors and evidence they believe most appropriate. As noted above, this is what we suggested as an alternative approach to the two-step procedure in the *Notice*, and no commenters have provided any persuasive arguments against such an approach to comparative hearings if we reject the two-step procedure.²⁶⁸ Of course, if the renewal applicant can demonstrate substantial performance and thus an entitlement to a renewal expectancy, this will continue to be the most important factor and can be expected in most cases to outweigh other considerations in favor of the challenger.

214. In so concluding, we acknowledge that comparative renewal hearings tend to be time-consuming and expensive for both the Commission and the private parties, and to disserve the public interest by prolonging the period during which a renewal applicant operates under a cloud. In these circumstances, we remain willing, where the circumstances afford assurance that the competing applications were not filed for speculative or other improper purpose, to waive the limitations on payments to dismissing applicants in comparative renewal proceedings, and we will, as commenters suggest, expeditiously consider such settlement agreements.²⁶⁹ This will serve the public interest by expediting the resolution of proceedings that were prolonged as a result of the court's decision in *Bechtel II*. Although we are sympathetic to the unusual delays occasioned in these cases by the comparative freeze, we decline to consider the licensee's performance after the renewal term for purposes of determining whether it deserves a renewal expectancy, as one commenter suggests,²⁷⁰ or to make other suggested changes in comparative renewal proceedings that would apply to only a few pending cases and have no future applicability.²⁷¹ We believe that the fairest and most expeditious approach in these cases is to decide them as nearly as possible according to the standards in effect prior to *Bechtel II*. We accomplish this by deciding them on a case-by-case basis, affording all parties the flexibility to present evidence they deem relevant under the standard comparative issues, and at the same time adhering to the criteria for evaluating the renewal applicant's performance during the license term to determine its eligibility for, and the comparative significance of, any renewal expectancy.

F. Request for Recusal of Commissioners

²⁶⁸ One commenter urges that in cases in which the renewal applicant is not awarded a renewal expectancy the Commission should rely on diversification. See Comments of Lawrence Brandt at 2-3. Another commenter recommends that the Commission resolve these cases on a case-by-case basis, consider all comparative criteria except for integration, and accord comparative credit for the incumbent's past record based on the strength of the station's performance during the license period. See Reply Comments of Simon T. at 16-19.

²⁶⁹ See Comments of Parties to Comparative Renewal Proceedings at 5; Reply Comments of National Minority T.V., Inc. at 3.

²⁷⁰ See Reply Comments of National Minority T.V., Inc. at 2.

²⁷¹ One filing, for example, urges that the Commission expedite the resolution of motions to dismiss pending against competing applications as a means of possibly eliminating the need for any comparative hearing, and adopt a variety of measures designed to ascertain the *bona fides* of any competing applicants. See Comments of Parties to Comparative Renewal Proceedings at 5-6. See also Reply Comments of National Minority T.V., Inc. at 1-2.

215. Willsyr Communications, an applicant in a frozen hearing proceeding involving a new FM station in Biltmore Forest, North Carolina, filed a Motion to Recuse FCC Commissioners, as well as comments in this rulemaking proceeding. This Motion is denied in its entirety. A separate statement from Chairman Kennard addresses the request that he recuse himself from this rulemaking.²⁷² Based on the applicable law of recusal, the other four commissioners decline to recuse themselves from this rulemaking and from the related adjudicatory proceeding involving Biltmore Forest. Recusal from a rulemaking is warranted only upon a clear and convincing showing of an unalterably closed mind, as to issues of fact or policy,²⁷³ whereas the test for disqualification of a Commissioner from an adjudicatory proceeding on grounds of bias or the appearance of bias is whether "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."²⁷⁴

216. At no time during the confirmation process was Commissioner Furchtgott-Roth, Tristani or Powell, or any member of his or her staff, contacted as to the merits of using comparative hearings rather than auctions to decide certain pending adjudicatory proceedings, as to the merits of the ongoing permanent license proceeding involving Biltmore Forest, North Carolina, or of any adjudicatory licensing proceeding potentially affected by the auction rules we adopt today. In addition, subsequent to confirmation, none has received any impermissible *ex parte* communication regarding the merits of any issue in this rulemaking, or any related adjudicatory proceeding. Each confirms that no impermissible factor has influenced, or would influence in the future, his or her decision on any aspect of this rulemaking proceeding, or on the merits of pending applications. There is, therefore, no basis to challenge the participation of Commissioners Furchtgott-Roth, Powell and Tristani in deciding any issue in this rulemaking proceeding or any related adjudicatory licensing proceeding.

217. There is also no basis to challenge the participation of Commissioner Ness in either proceeding. A requester seeking the recusal of a commissioner from an adjudicatory proceeding must point to specific statements clearly showing prejudgment of both the facts and law of a given case, and such statements must be viewed in the context of the entire case.²⁷⁵ Willsyr, however, relies exclusively on public remarks quoted in *Mediaweek* (Jan. 5, 1998) that Commissioner Ness was "concerned that auctions, while quick and efficient, ignore the equities that exist in some of these outstanding radio license

²⁷² Chairman Kennard is already recused from participating in the Biltmore Forest licensing proceeding. See Letter, dated July 15, 1997, from William E. Kennard, General Counsel, Federal Communications Commission, to Mark Langer, Clerk of the Court, United States Court of Appeals for the District of Columbia (withdrawing his notice of appearance in *Orion Communications Ltd. v. FCC* (Case No. 96-1430), and notifying the court of his recusal from further participation in that proceeding).

²⁷³ See *C & W Fish Company v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991).

²⁷⁴ *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995), citing *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).

²⁷⁵ See *Fox Television Stations*, 9 FCC Rcd 5246, 5250 (1994) (Separate Statement of Chairman Quello), *aff'd sub nom. Metropolitan Council of NAACP Branches*, 46 F.3d at 1164-65.

cases, including Lee's.²⁷⁶ These remarks merely reformulate an issue of policy expressly articulated by the Commission in its *Notice* in this rulemaking proceeding.²⁷⁷ But they neither suggest that Lee should be singled out for special treatment, intimate how the Biltmore Forest proceeding should be resolved, nor indicate Commissioner Ness's view on whether certain cases should be resolved through the comparative hearing process instead of by auction. Hence, the statements provide no basis for a disinterested reader of the *Mediaweek* article to conclude that the Commissioner had adjudged in advance any party-specific question of fact or law concerning the merits of any of the pending applications for Biltmore Forest, or that recusal from the adjudicatory proceeding is necessary to prevent the appearance of such prejudice. As to the policy issue of whether to use comparative hearings in certain cases, the remarks identify, but do not discuss the relative merits of, competing public interest considerations (*i.e.*, the speed and efficiency of auctions and the equities existing in some cases) pertinent to that issue. Thus, they in no way show by clear and convincing evidence that Commissioner Ness had an unalterably closed mind on that issue, and therefore they fall far short of the threshold showing necessary to disqualify a commissioner from participating in a rulemaking.

218. Willsyr also surmises that the remarks quoted in the *Mediaweek* article indicate that Commissioner Ness must have been presented with, and considered, extra-record evidence regarding the merits of Orion Broadcasting's pending license application for Biltmore Forest in the context of the issue concerning the use of comparative hearings. The Commissioner affirmatively states that she has not received any impermissible *ex parte* communications regarding the merits of pending applications or the issue of whether considerations of fairness warrant the use of comparative hearings rather than auctions to decide certain outstanding license cases (including the mutually exclusive applications at issue in the Biltmore Forest license proceeding).

IV. PROCEDURAL MATTERS AND ORDERING CLAUSES

219. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix B.

220. Accordingly, IT IS ORDERED, That pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403, this *First Report and Order* IS ADOPTED, and Part 73 and Part 74 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

221. IT IS FURTHER ORDERED, That the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register, and the information

²⁷⁶ The individual mentioned in the quotation, Zebulon Lee, is a principal of Orion Broadcasting, one of the competing applications for a new FM station in Biltmore Forest. The Biltmore Forest license proceeding is one of the fewer than ten frozen hearing cases that did not settle.

²⁷⁷ *Notice*, 12 FCC Rcd at 22372-73 (¶ 22), requesting comments on "whether the resources these applicants [who have progressed at least through an Initial Decision by an Administrative Law Judge] have expended, as well as the delays they have encountered, raise special equitable concerns that should lead us to have comparative hearings in these cases even if we use auctions for other pending cases."

collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

222. IT IS FURTHER ORDERED, That the Motion to Recuse FCC Commissioners, filed February 25, 1998, by Willsyr Communications, Limited Partnership, IS DENIED.

223. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.61, 0.131(c), 0.283 and 0.331, the Chief of the Mass Media Bureau and the Chief of the Wireless Telecommunications Bureau ARE GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific broadcast service and Instructional Television Fixed Service auctions.

224. IT IS FURTHER ORDERED, That the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *First Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

225. IT IS FURTHER ORDERED, That GC Docket No. 92-52 and GEN Docket No. 90-264 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Magalfe Roman Salas
Secretary

APPENDIX A – LIST OF COMMENTING PARTIES

Comments

American Women In Radio & Television, Inc.
Anchor Broadcasting Limited Partnership
Arizona Board of Regents for Benefit of the University of Arizona, et al. (collectively, "ITFS Parties")
Arizona Board of Regents for Benefit of the University of Arizona, et al. (collectively, "Noncommercial Educational Broadcast Licensees")
Association for Community Education
Association of America's Public Television Stations (AFCCE)
Association of Federal Communications Consulting Engineers
Barger, John W.
Batesville Broadcasting Company, Inc.
Beacon Broadcasting, Inc.
Bechtel, Susan M.
BellSouth Corporation and BellSouth Wireless Cable, Inc.
Bernhard, Andrew and Julia, et al. (collectively, "Certain Broadcast Applicants")
Bible Broadcasting Network, Inc.
Big Ben Broadcasting, et al. (collectively, "Various Post-July 1, 1997 FM Applicants")
Bill, Howard G.
Bingham, Steve
Bledsoe Communications, Ltd.
Board of County Commissioners of Monroe County, Florida, et al. (collectively, "Six Video Broadcast Licensees")
Board of Education of the City of Atlanta, et al.
Board of Trustees of Community-Technical Colleges (Connecticut), et al.
Boelter, Elizabeth and Adolph
Brandt, Lawrence
Brantley Broadcast Associates
Breeze Broadcasting Co., Ltd.
Bulmer, John Anthony
Burr, Phillip
Cavallo, James G.
Channel Twenty Television Co., LLC
Cilurzo, Stephen M.
Colby, Lauren A., on Behalf of Various Identified Parties
College of the Albermarle, et al.
Columbia FM Limited Partnership
Communications Technologies, Inc.
Cook Inlet Region, Inc.
Corporation for Public Broadcasting
Cowan, Terry A.
Cox Radio, Inc.
Cromwell Group, Inc.
Czelada, Edward
Dakota Communications, et al.
Danbeth Communications, Inc.
Davis Television Duluth, LLC, et al.
De La Hunt Broadcasting Corporation

Desmond, Thomas
Diotte, Linda
Eckols, Dorisann L.
Eustis, Jeffrey N.
Eells, Thomas M.
Ferrigno, Michael
Flinn, Jr., George S.
Friendship Broadcasting, LLC
Grace Communications L.C.
Grass Roots Radio, Inc.
Grimmelmann, Cynthia
Gross, Joe L.
Gulf Coast Broadcasting, Inc.
Harris, Lisa M.
Hatfield & Dawson Consulting Engineers, Inc.
Hawley, Judy
Heidelberg-Stone Broadcasting Co.
Hispanic Information and Telecommunications Network
Howard, Jr., Kenneth C.
Independent Broadcast Consultants, Inc.
Indiana Higher Education Telecommunications System
J & M Broadcasting Co., Inc.
J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc.
Jacor Communications, Inc.
Jay Man Productions, Inc.
JEM Broadcasting Co., Inc.
JTL Communications Corporation
Kayo Broadcasting
KERM, Inc.
Kidd Communications
KM Communications, Inc.
KM Broadcasting, Inc.
Kulba, Leslee
Kurtz, Wolfgang V.
Lakefront Communications, Inc.
Lamprecht, J. Thomas
Lansman, Jeremy
Lay Catholic Broadcasting Network
Liberty Productions, LP
Lindsay Television, Inc.
Linear Research Associates
Lutz, Betty M.
Mableton Investment Group
Maciejewski, Jack L.
Magrill, Kyle
Mahaffey, Robert B.
Marri Broadcasting, L.P.
Moore, Jr., Robert R.
Morris, Art
Music Ministries, Inc. and Sacred Heart University, Inc.

NAACP Legal Defense and Educational Fund, Inc.
National Association of Black Owned Broadcasters
National Association of Broadcasters
National ITFS Association
National Public Radio, Inc., et al.
National Translator Association
NDEE NITCHI'I BINAGODI'E d/b/a/ Apache Radio Broadcasting Corp.
New Jersey Television Corporation
New Life Evangelistic Center, Inc.
Nobco, Inc.
Noordyk, Donald James
Noordyk, Todd Stuart
Orion Communications Limited
Pacific Radio Engineering
Pappas Telecasting of America
Pennsylvania State University
Pentecostal Revival Association, Inc.
Perkins, Jr., Roy F.
Positive Alternative Radio, Inc., et al.
Power, John
R&S Media, et al.
Reynolds, Lee S.
Reynolds Technical Associates
Rio Grande Broadcasting Co.
Robol, Ken
Rocky Mountain Corporation for Public Broadcasting
Runnels, Dewey Matthew
School District of Palm Beach County, Florida
Schwary, R.L.
Scranton Times, L.P. and Shamrock Communications, Inc.
Sellmeyer Engineering
Seven Ranges Radio Co. Inc.
Shannon, Paula
Simes, Raymond and L.T. Simes II
Sinclair Broadcast Group, Inc.
SL Communications, Inc.
Smith, Thomas C.
Sound Broadcasting, Inc. and Regency Broadcasting, Inc.
Steinkopf, K.
Tanana Valley Television Company
Throckmorton Broadcasting, Inc.
Tri-County Broadcasting, Inc.
Trinity Broadcasting of Florida, Inc., et al. (collectively, "Parties to Comparative Renewal Proceedings")
United Broadcasters Company
University of Northern Iowa
Wilk, Edward J.
Williams Broadcasting Company
Willsyr Communications, LP
Wilson, Duane D.

Wireless Cable Association International, Inc.
Young, Harold W.

Reply Comments

Adams Communications Corporation and Alan Shurberg d/b/a/ Shurberg Broadcasting of Hartford
Arizona Board of Regents for Benefit of University of Arizona, et al. (collectively, "Noncommercial
Educational Broadcast Licensees")

Arizona Lotus Corp.

Arnold Broadcasting, Inc.

Ball State University, et al.

Beacon Broadcasting Corporation

Bechtel, Susan M.

BellSouth Corporation and BellSouth Wireless Cable, Inc.

Belmont Abbey College

Big Ben Broadcasting, et al. (collectively, "Various Post-July 1, 1997 FM Applicants")

Bill, Howard G.

Brantley Broadcast Associates

Carteret Community College

CD Broadcasting, Inc.

Channel Twenty Television Company, LLC

College of the Albermarle, et al.

Communications Technologies, Inc.

Community Telecommunications Network

Davis Television Corpus Christi, LLC, et al.

Duhamel Broadcasting Enterprises

Eustis, Jeffrey N.

Galaxy Communications, Inc.

Glendale Broadcasting Company and Maravillas Broadcasting Company

Hispanic Information and Telecommunications Network

Hoke County School System

Jacor Communications, Inc.

KQED, Inc.

Lakefront Communications, Inc.

Linear Research Associates

McComas, Irene Rodriguez Diaz de

Minnesota Public Radio

Mitchell Community College

Montgomery Communications, Inc.

National Minority T.V., Inc.

National Public Radio, Inc., et al.

Network for Instructional TV, Inc., et al. (collectively, "ITFS Coalition")

NOW Foundation

Orion Communications Limited

Out of Market Productions

Paxson Communications Corporation

Peoples Network, Inc., et al.

Positive Alternative Radio, Inc., et al.

Press Communications, LLC

Queens College

Radio Enterprises of Ohio, Inc.
R&S Media, et al.
Rowan-Cabarrus Community College
Simon T
United Church of Christ, Office of Communication, et al.
University of North Carolina, et al.
University of Northern Iowa
Vermont Public Radio and Monroe Board of Education
WB Television Network
WEEU Broadcasting Company
WGUL-FM, Inc.
Willsyr Communications, Limited Partnership
Wireless Cable Association International, Inc.

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS (FRFA)

First Report and Order

As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (Notice)*² in this proceeding. The Commission sought written public comments on the proposals in the *Notice*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *First Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.³

I. Need For and Objectives of Action:

This *First Report and Order* adopts rules to implement the Balanced Budget Act of 1997 (Budget Act)⁴ which amended Section 309(j) and adopted new Section 309(l) of the Communications Act. Specifically, this *First Report and Order*: (1) adopts competitive bidding procedures to award construction permits in the commercial broadcast and secondary broadcast services; (2) amends application filing procedures for the broadcast services to complement the competitive bidding process; (3) determines to utilize competitive bidding to resolve pending mutually exclusive broadcast applications; (4) determines that the Commission is statutorily required to auction competing Instructional Television Fixed Service (ITFS) applications; and (5) establishes procedures for resolving a small number of pending comparative renewal cases, which cannot be resolved by auction under the Commission's revised competitive bidding authority. The *First Report and Order* adopts a tiered "new entrant" bidding credit for entities with controlling interests in either no, or less than four, other media entities so as to further the goals of the designated entity provisions of Section 309(j). As noted in the *First Report and Order*, the Commission intends to continue its review of the barriers to entry or growth that may exist for small, minority- and women-owned businesses in broadcasting, and to make adjustments to its designated entity provisions, as appropriate, in light of these studies.

II. Significant Issues Raised by the Public in Response to the Initial Analysis:

No comments were received specifically in response to the IRFA contained in the *Notice*. However, some comments did address certain small business issues. A number of commenters called for the adoption of bidding credits for small businesses to ensure their participation in broadcast spectrum auctions, noting that bidding credits have been effective in helping small businesses compete in previous

¹ 5 U.S.C. § 603.

² *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Notice of Proposed Rulemaking*, 12 FCC Rcd 22363 (1997).

³ Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA); see generally 5 U.S.C. §§ 601 *et seq.* Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁴ Pub. L. No. 105-33, 111 Stat. 251 (1997).

Commission auctions.⁵ To promote diversification of ownership of broadcast stations, a number of commenters also supported the adoption of bidding credits for non-group owners, who would likely be small businesses.⁶ Some commenters argued that upfront payments should be small enough to allow small businesses to compete effectively.⁷ Commenters generally opposed the use of competitive bidding for selecting among mutually exclusive ITFS applicants. ITFS licensees are primarily educational institutions and governmental educational entities, and commenters contended that subjecting ITFS to competitive bidding would, *inter alia*, divert the limited funds of educators away from educational purposes to purchasing licenses and perhaps even discourage educators from applying for licenses.⁸

Small business-related issues were also raised by commenters more indirectly. A small number of commenters opposed requiring prospective bidders in broadcast auctions to file their short-form applications (FCC Form 175) electronically, contending that electronic filing would be a barrier to participation by those not computer literate or by low power television (LPTV) and translator applicants (many of whom are small businesses).⁹ Several commenters also asked the Commission to reconfirm its support for certain previously-adopted special measures to protect LPTV and television translator stations that are displaced during the transition to digital television.¹⁰ These commenters sought confirmation that such displacement applications by LPTV and television translator licensees would not be subjected to competing applications and auction procedures.¹¹ A small number of commenters additionally contended that it was unfair or inequitable to auction secondary broadcast services (LPTV and television and FM translators), the licensees of which tend to be small businesses.¹²

⁵ See Comments of Cook Inlet Region, Inc.; Danbeth Communications, Inc.; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc.; Apache Radio Broadcasting Corp.; Thomas C. Smith; Edward Czedala; American Women in Radio & Television, Inc.; James G. Cavallo; JTL Communications Corp.

⁶ See Comments of Grace Communications, L.C.; Kyle Magrill; Throckmorton Broadcasting, Inc.; JTL Communications Corp.; Friendship Broadcasting, LLC; Cook Inlet Region, Inc.; Danbeth Communications, Inc.; Tri-County Broadcasting, Inc.; James G. Cavallo; Thomas Desmond; Kidd Communications.

⁷ See Comments of JTL Communications Corp.; Independent Broadcast Consultants, Inc.

⁸ See, e.g., Comments of Corporation for Public Broadcasting; ITFS Parties; BellSouth Corporation and BellSouth Wireless Cable, Inc.; Indiana Higher Education Telecommunications System; School District of Palm Beach County, Florida.

⁹ See Comments of Six Video Broadcast Licensees; Kyle Magrill; Thomas C. Smith; Liberty Productions, LP; Rio Grande Broadcasting Co.; Heidelberg-Stone Broadcasting Co.

¹⁰ See *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14653-54 (1997) (LPTV stations and television translators displaced by new digital television stations will be allowed to apply for suitable replacement channels in the same area without being subject to competing applications; such applications by displaced LPTV and television translator stations will be considered on a first-come, first-served basis, and may be submitted at any time without waiting for a filing window to open).

¹¹ See Comments of National Translator Association; Association of America's Public Television Stations.

¹² See Comments of Friendship Broadcasting, LLC; Board of Education of the City of Atlanta, *et al.*; Bible Broadcasting Network, Inc.

III. Description and Number of Small Entities Involved:

Under the RFA, small entities include small organizations, small businesses, and small governmental jurisdictions.¹³ The RFA¹⁴ defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.¹⁵ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Pursuant to the RFA, the statutory definition of a small business applies when considering the impact of an agency's action(s) "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, established one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

In the *Notice* we stated that we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not particularly suitable for our purposes, and we sought comment on how we should define small business for this purpose. While we utilized the SBA's definition to determine the number of small businesses to which any auction procedures would apply, we reserved the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations. We received no comment in response to the IRFA on how to define radio and television broadcast "small businesses." Therefore, we will continue to utilize the SBA's definitions for the purposes of this FRFA.

Radio Broadcasting Stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.¹⁶ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.¹⁷ Included in this industry are commercial, religious, educational, and other radio stations.¹⁸ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.¹⁹ Official Commission records indicate that 11,334 individual radio stations were operating in 1992.²⁰ The 1992 Census indicates that 96 percent of radio station establishments (5,861 of 6,127) produced less than \$5 million in revenue in 1992.²¹ As of May 31, 1998, official Commission records indicate that 4,724 AM

¹³ 5 U.S.C. § 601(6).

¹⁴ 5 U.S.C. § 601(3).

¹⁵ 15 U.S.C. § 632.

¹⁶ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4832 (1996).

¹⁷ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ FCC News Release No. 31327, January 13, 1993.

²¹ The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

radio stations, 7,595 FM radio stations and 3,011 FM translator/booster stations were licensed.²² We conclude a similarly high percentage (96 percent) of current radio broadcasting licensees are small entities.

Television Broadcasting Stations. The SBA defines a television broadcasting station that is independently owned and operated, is not dominant in its field of operation, and has no more than \$10.5 million in annual receipts as a small business.²³ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.²⁴ Included in this industry are commercial, religious, educational, and other television stations.²⁵ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.²⁶ There were 1,509 television stations operating in the nation in 1992.²⁷ In 1992,²⁸ there were 1,155 television station establishments that produced less than \$10.0 million in revenue (76.5 percent).²⁹ As of May 31, 1998, official Commission records indicate that 1,579 full power television stations, 2089 low power television stations, and 4924 television translator stations were licensed.³⁰ We conclude that a similarly high percentage of current television broadcasting licensees are small entities (76.5 percent).

ITFS. In addition, there are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity.³¹ ITFS is a non-pay, non-commercial educational microwave service that, depending on SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts.³² However, we do not collect, nor are we aware of other collections of, annual revenue data for

²² FCC News Release, June 19, 1998.

²³ 13 C.F.R. § 121.201, SIC 4833.

²⁴ Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

²⁵ *Id.*

²⁶ *Id.*

²⁷ FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, *supra*, Appendix A-9.

²⁸ Census for communications establishments are performed every five years, during years that end with a "2" or "7". See Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9, III (1995).

²⁹ The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

³⁰ FCC News Release, June 19, 1998.

³¹ See 5 U.S.C. §§ 601(3) - (5).

³² See 13 C.F.R. § 121.210, SIC 4833, 4841 and 4899.

ITFS licensees. Thus, we conclude that up to 1932 of these licensees are small entities.

Pending and Future Applicants Affected by Rulemaking. The auction procedures set forth in the *First Report and Order* will affect: (1) any entity with a pending application for a construction permit for a new full service commercial radio or analog television broadcast station, if mutually exclusive applications have been filed; (2) any entity that files an application in the future for a new full service commercial radio or analog television station, if mutually exclusive applications are filed; (3) any entity with a pending application on file, or filing an application in the future, for a new low power television station, or a television or FM translator station, if mutually exclusive applications have been or are filed; (4) any entity that has a pending or future application to make a major change in an existing facility in any commercial broadcast or secondary broadcast service, if mutually exclusive applications have been or are filed; and (5) any entity that has filed or files in the future an application for a license for an ITFS station, if mutually exclusive applications have been filed or are filed.

We estimate that, as of the adoption date of the *First Report and Order*, there are approximately:³³

- 700 mutually exclusive pending applications for commercial radio stations, and 200 pending competing applications for full power commercial analog television stations;
- 100 mutually exclusive pending applications for low power television stations and television translator stations, and 30 competing applications for FM translator stations; and
- 200 or more mutually exclusive pending applications for ITFS stations.

Although applicants for broadcast construction permits have been required to demonstrate sufficient financing to construct and initially operate the proposed broadcast station, we do not require the filing of financial information specifically concerning the entity seeking a construction permit, such as the entity's annual revenues. Thus, we have no data on file as to whether entities with pending permit applications, which are subject to the new auction rules adopted for the broadcast services, meet the SBA's definition of a small business concern. However, we conclude that, given the smaller size of the markets at issue in the pending applications, most of the entities with pending applications for a permit to construct a new primary or secondary broadcast station are small entities, as defined by the SBA rules.

In addition to the pending applicants that may be affected by the auction procedures adopted for the broadcast services, any entity that applies for a construction permit for a new broadcast station in the future will be subject to these competitive bidding procedures if mutually exclusive applications are filed. It is not possible, at this time, to estimate the number of markets for which mutually exclusive applications will be received, nor the number of entities that in the future may seek a construction permit for a new broadcast station. Given the fact that fewer new stations (particularly fewer analog television stations) will be licensed in the future and that these stations generally will be located in smaller, more rural areas, we conclude that most of the entities applying for these stations will be small entities, as defined by the SBA rules.

Any competitive bidding procedures developed for the broadcast services will not apply to the few

³³ These numbers do not include pending mutually exclusive applications for which we have received settlement agreements which are pending. We anticipate that many of these settlement agreements will be approved which will result in the dismissal of all but one of these mutually exclusive applications and the grant of the remaining application.